INDEX TO CITATIONS

1. Ashton Power Wrecker Equipment Company, Inc. v. The State of Michigan and the Department of Revenue of the State of Michigan, 332 Mich. 432 1

2. Callaghan's Michigan Pleadings and Practice, Volume 8, Section 58.53, Page 158..... 11

3. Honigman's Michigan Court Rules Annotated, Author's Comment, Page 692..... 12

4. J. B. Simpson, Inc., v. O'Hara, 277 Mich. 55..... 6-8-9

5. McGoldrick v. Berwin-White Coal Mining Co., 309 US 33 (84 L ed 565, 60 S Ct 388)..... 7-8

6. Michigan Sales Tax Act, being Act 167, Public Acts of 1933, as amended; Michigan Compiled Laws of 1948, Section 205.51; Michigan Statutes Annotated, 1950 Revised Volume 6, Section 7.521 4

7. Michigan Supreme Court Rule 67, Section 1..... 2

8. Michigan Uniform Sales Act, being Act 100, Public Acts of 1913, as amended, Rule 4, Section 19; Michigan Compiled Laws of 1948, Section 440.19, Rule 4; Michigan Statutes Annotated, Section 19.259..... 4

9. Plaintiff's Declaration, Notice of Protest, Exhibit "A", Paragraph 1..... 3

10. Plaintiff's Declaration, Paragraph 10..... 3

UNITED STATES OF AMERICA

In the Supreme Court of the United States

ASHTON POWER WRECKER EQUIPMENT COMPANY, INC., a Michigan Corporation,

Plaintiff-Appellant,

vs.

THE STATE OF MICHIGAN AND THE DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN,

Defendant-Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO STATEMENT OF APPELLEES MAKING AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I.

Defendant and appellee's first argument against jurisdiction in its Statement Making Against Jurisdiction and Motion to Dismiss appears to be that the question of the constitutionality of the Michigan Sales Tax Act was not raised in nor decided by the Michigan Supreme Court nor by the trial court. It is hard to understand how the State of Michigan can seriously take such a position when in its

Brief filed with the Michigan Supreme Court on its appeal to that court from the trial court, it stated the following on page 7:

"SOLE QUESTION INVOLVED

> Is the Department of Revenue of the State of Michigan prohibited by the commerce clause of the United States Constitution (*) from imposing a tax pursuant to the provisions of the Michigan Sales Tax Act (*) on the gross proceeds received by a Michigan corporation engaged in the business of selling tangible personal property at retail within the State of Michigan, to the extent that the gross proceeds received in the conduct of such business are derived from sales made to persons presumably residing without the State of Michigan when the contracts for such sales are accepted by the corporation at its place of business within the State of Michigan; when equipment is fabricated and installed by the corporation at its place of business within the State of Michigan on the purchasers' other tangible personal property located within the State of Michigan; and when the purchasers actually receive and accept delivery from the corporation at the corporation's place of business within the State of Michigan?"

so that the State of Michigan itself in the appeal to the Michigan Supreme Court not only stated that the question involved was whether or not the Michigan Sales Tax Act was contrary to the commerce clause of the United States Constitution, but limited its appeal to that question exclusively.

This statement of the question involved was required by Rule 67, Section 1 of the Michigan Supreme Court Rules, which also limited the consideration of the questions involved to that statement. Said Rule is as follows:

> "Beginning on the first page of the brief appellant shall concisely and without repetition, under the heading 'Statement of Questions Involved,' state the ques-

> tions involved in the appeal. Each question shall be numbered and set forth separately, in the briefest terms, and whenever possible, each question must be followed immediately by a statement as to whether the lower court answered it 'Yes' or 'No' or qualified it or failed to answer it, together with a statement that appellant contends that it should be answered 'Yes' or 'No' as the case may be. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.
>
> The stated questions herein required shall be used in the same order as topical subheadings throughout the 'argument' in the appellant's brief provided for in section 3 of this rule."

Defendant-appellee further argues that the question was not raised in the trial court. We quote Paragraph 10 of Plaintiff's Declaration which is as follows:

> "If it should be determined however, that the aforementioned sales were sales within the State of Michigan within the meaning of said statute then said statute is contrary to the Constitution of the United States, Section 8(3) Article I thereof in that it places a burden upon interstate commerce and is unconstitutional to the extent that it does so."

We further quote Paragraph 1 of the Notice of Protest which was made a part of the Declaration by express reference thereto which is as follows:

> "The sales upon which the sales tax is sought to be collected were actually sales in interstate commerce and the levying of a sales tax thereon a burden on such sales and a burden on interstate commerce, contrary to the laws of the State of Michigan and the United States of America, and contrary to the Constitution of the State of Michigan and the United States of America."

On page 7 of said statement and motion it is argued that the only matter before the court was a question of fact as to whether or not the sales were within the state. At the time of the hearing in the trial court it was stipulated between the plaintiff and the defendant that all sales involved were within the state within the definition of the Michigan Sales Tax Act. To be more explicit, it was stipulated that the transfer of the incidents of ownership, which in this case amounted to delivery of possession, took place within the State of Michigan.

Section (b) of the Michigan Sales Tax Act, being Act 167, Public Acts of 1933, as amended; Michigan Compiled Laws of 1948, Section 205.51; Michigan Statutes Annotated, 1950 Revised Volume 6, Section 7.521, is as follows:

> "The term 'sale at retail' means any transaction by which is transferred for consideration (any of the incidents of) the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale in the form of tangible personal property to a person licensed under this act."

Section (h) thereof is as follows:

> "The term 'gross proceeds' means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the propery sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted."

Rule 4, Section 19 of the Uniform Sales Act being Michigan Statutes Annotated, Section 19.259, provided as follows:

"Rule 4. *** (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in Section twenty (20). This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' of their equivalents."

Unfortunately the Assistant Attorney General who entered into the Stipulation of Facts in the trial court and who prepared the brief before the Michigan Supreme Court is not now handling this case and the attorney now handling the matter does not seem to understand the proposition which his client presented to the Michigan Supreme Court and to the trial court. As further evidence of the defendant and appellee's confusion and misunderstanding in this matter we quote the syllabi of the case as it appears in 332 Michigan Reports on page 432:

"1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE—STATE TAXES.

A State tax which operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon congress can be said to exceed constitutional limitations (US Const, art 1, sec. 8).

2. SAME—INTERSTATE COMMERCE—STATE TAXES.

Not all State taxation is unconstitutional because, in some manner, it has an effect upon interstate commerce.

3. TAXATION — EXEMPTION — BURDEN OF PROOF.

A taxpayer claiming immunity from a tax has the burden of establishing his exemption.

4. SAME — SALES — INTERSTATE COMMERCE — LOCAL ACTIVITY.

A State sales tax is not an unconstitutional burden upon interstate commerce merely because the sale was negotiated through the channels of interstate commerce or because the goods involved will be transported to points outside the State almost immediately, as long as it is conditioned upon a sufficient local activity.

5. SAME — SALES — INTERSTATE COMMERCE — AUTOMOBILE WRECKER EQUIPMENT.

Transaction whereby title and possession of automobile wrecker equipment passed to the purchasers within this State, it was installed on the purchaser's chassis in this State from material furnished here for use on property belonging to parties outside the State, constituted sufficient local activities upon which to predicate a sales tax by this State, although initiated through interstate commerce and the same property may be subject to a use tax by another State (US Const. art 1, sec. 8; CL 1948, sec. 205.51—205.78).

6. COSTS — PULIC QUESTION — SALES TAX.

No costs are allowed in action to recover payment of State sales tax, made under protest, where there was a question of a public nature involved (US Const, art 1, sec. 8; CL 1948, sec. 205.51—205.78)."

Certainly Justice Bushnell who wrote the Opinion for the Michigan Supreme Court was as aware of the constitutional question involved. Justice Bushnell, on page 435 in his

Opinion, cites the Michigan case of *J. B. Simpson, Inc.* v. *O'Hara,* 277 Mich. 55, and states as follows:

> "These cases are related to the one now under consideration only in that the same general problem was presented, namely under what circumstances are sales sufficiently in interstate commerce to be excluded from the imposition of the State sales tax. The specific questions there involved, however, are unlike that presented here."

On page 436 Justice Bushnell further said:

> "We are not persuaded that the precise question involved in the present appeal had been heretofore determined by us; on the contrary, we feel that it is an open one.
>
> We stated in *People* v. *Bob-Lo Excursion Co.,* 317 Mich. 686, at page 691:
>
> 'Since by the Federal Constitution the power to regulate both foreign and interstate commerce is vested in Congress (United States Constitution, art. 1, sec. 8) due consideration must be given to pertinent decisions of the Supreme Court of the United States'."

The Justice then goes on to quote from the case of *McGoldrick* v. *Berwin-White Coal Mining Co.,* 309 US 33 (84 L ed 565, 60 S Ct 388), which quotation is as follows:

> "It is only when the tax operated to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations.***
>
> " 'Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which

> nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress . . .
>
> " '*** Courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by State action, and that the power to lay taxes for the support of State government shall not be unduly curtailed.' "

and after citing many other United States Supreme Court decisions bearing upon this question Justice Bushnell said on page 438:

> "Through these authorities runs the thread of reasoning that (1) the fact that a sale was negotiated through the channels of interstate commerce is immaterial; (2) that it is also immaterial that the goods will be transported to points outside the State almost immediately; and (3) that a state sales tax is lawfully imposed if it is conditioned upon a sufficient local activity."
>
> "For the reasons stated, we must disagree with the trial judge and hold that the sales tax was lawfully imposed in the instant case."

When Justice Bushnell refers to the lawful imposition of the tax, he is referring to the levying thereof within the constitutional limitation referred to on pages 436 and 437 of his Opinion. He is referring to the constitutional limitation as set forth in *J. B. Simpson, Inc.* v. *O'Hara, Supra,* and the *McGoldrick* v. *Berwin-White Coal Mining Co., Supra,* and of the constitutional limitation set forth by the State of Michigan which by its own statement limited the question involved as follows:

> "Is the Department of Revenue of the State of Michigan prohibited by the commerce clause of the United States Constitution from imposing a tax pursuant to the Michigan Sales Tax Act, etc."

As we said before, it is unfortunate that the State of

Michigan should go so far astray as to not know the proposition which it presented to the Michigan Supreme Court for decision. In case there remains any doubt in the mind of the new Assistant Attorney General as to the position of his predecessor or of his client, let us quote from the Brief filed by the State of Michigan in its appeal to the Michigan Supreme Court. On page 14 of such Brief we find the following:

> "It is submitted, therefore, that unless the appellee can show the proceeds are exempt by the interstate commerce clause of the Federal Constitution, all of its proceeds derived from the sales in question are clearly subject to the tax. This is because the contracts for sale were accepted in Michigan and possession and title to the property sold by appellee was transferred in Michigan to its purchasers."

And on page 26 the following:

> "Not only do the above cases clearly refute any argument raised by the appellee, but they also firmly establish the constitutionality of the appellants' assessment."

And on page 31 the following:

> "Several opinions of the highest courts of a number of states have been concerned with the validity of the sales tax imposed upon gross proceeds derived from sales comparable to the sales in question, and have consistently denied exemptions claimed under the interstate commerce clause."

And on page 40 the following:

> "In the case of *J. B. Simpson, Inc.* v. *O'Hara, Supra*, this court held that the State of Michigan was prohibited by the commerce clause of the Federal constitution from imposing a sales tax on gross proceeds derived from orders sent from the State of Michigan to Illinois by Michigan residents, where such orders were accepted and title to the property

> sold passed to the purchasers immediately upon delivery to the carrier in Illinois."

And on page 41 the following:

> "In *Montgomery Ward & Co. v. Fry, Supra,* this court held that the State of Michigan was prohibited by the commerce clause of the Federal constitution from imposing its sales tax on gross proceeds derived from property sold in another state, even though such property was subsequently delivered to the purchasers within the State of Michigan and Stated at p. 265:
>
> > 'The question of interstate commerce, here presented, has been too long settled to admit any doubt. Wares and merchandise, shipped into a State for local sale and sold therein, are in the course of intrastate commerce. But wares and merchandise located in another state and sold, to be shipped from such state to this State and not to be here resold, constitute interstate commerce and, while such merchandise may be subject to a property tax when at rest in this State no privilege tax may be imposed.' "

Whether through ignorance or through indifference, the claim of the State of Michigan that the Michigan Supreme Court was not presented with and did not pass upon the question of the constitutionality of the Michigan Sales Tax Act would almost seem to be facetious.

II.

The second point argued by the appellee in its Statement Making Against Jurisdiction and Motion to Dismiss is not a question of jurisdiction but *the* question involved in this case, to-wit: Whether or not the tax levied by the Michigan Sales Tax Act constitutes such a burden upon interstate

commerce as to be contrary to Section 8 (3), Article I of the United States Constitution. The statement of the appellee does not appear to meet the proposition as set forth in plaintiff-appellant's statement as to jurisdiction filed in this Court, in which statement the appellant cited most of the cases which the appellee has set forth in its Statement and Motion to Dismiss and also set forth the reason why it believes those decisions do not apply in this particular case.

It is the appellant's contention that the Michigan Sales Tax Act is contrary to the Federal Constitution in levying a tax upon the transactions in question for the reason that we here have an interstate transaction at least in the sense that negotiations for the sale were interstate, the contract was entered into across state lines and the equipment was manufactured and fabricated for use in another state by a resident thereof, and which transaction, because of its interstate features is subject to two taxes, to-wit, a sales tax and a use tax, and which use tax was specifically designed to be levied upon interstate transactions only, and which transaction if it had had no interstate features would have been subject to one tax only. The State of Michigan in their Statement and Motion to Dismiss either are unaware that such is the appellant's argument or have no desire to answer it.

III.

The third proposition put forth by the appellee is that appellant's Petition for Appeal was not filed in time for the reason that it was not filed within three months of the remittitur of the Michigan Supreme Court although it was filed within the three months from the time the reversed judgment was entered by the trial court. The practice in the State of Michigan in such matters is set forth in Callag-

han's Michigan Pleadings and Practice, Volume 8, Section 58.53, Page 158, to-wit:

> "In an action at law, there are decisions of the supreme court which seem to deny power of the supreme court itself to render judgment on reversing a judgment of a circuit court, and there is no doubt that the supreme court cannot enter judgment without remandment where so to do would usurp the prerogative of a jury and involve infringement on the right to a jury trial. On the other hand, the power of the supreme court itself to render judgment in a proper case has been expressly recognized, as where only questions of law are involved and a new trial would be useless. Judgment cannot be entered for appellant on reversal of a case not based on findings or a verdict. The supreme court cannot assess the damages in law cases, nor itself award damages not awarded by the trial court. Final judgment cannot be entered by the supreme court in an action at law, if there is a question as to the amount of the verdict, where there is no means of knowing how the jury made up their verdict. Final judgment for appellant cannot be entered in the supreme court, on reversal, because the judgment was not supported by the evidence."

In other words, there are cases in which the Michigan Supreme Court may render a final judgment but by the Michigan Statutes and Court Rules these situations are limited to those in which the Supreme Court feels that there is nothing further to be done by the trial court. But where the judgment of the trial court is to be modified, corrected, amended or reversed, then the Supreme Court instead of itself rendering the final judgment remands the matter to the Circuit Court for the entry of the final judgment.

We also quote from Honigman's Michigan Court Rules Annotated, the author's comment to Rule 72 appearing on page 692 thereof:

> "Where the judgment of the lower court has been reversed or modified, the decision of the Supreme Court is effectuated either by judgment, order, or decree entered in the Supreme Court or by action of the lower court upon instructions contained in the remittitur or mandate of the Supreme Court."

The final paragraph of the Opinion rendered by the Michigan Supreme Court is as follows:

> "The judgment of the circuit court is vacated and the cause is remanded for entry of a judgment in favor of the defendant, State of Michigan, Department of Revenue. ***"

Plaintiff and appellant submit that the United States Supreme Court does have jurisdiction to hear this matter; that there is a substantial federal question involved, to-wit: Whether or not the Michigan Sales Tax Act violates the commerce clause of the Federal Constitution; that said question was properly raised, argued, and a decision rendered thereon in both the trial court and the Supreme Court of the State of Michigan and that the Petition for Leave to Appeal was filed within the statutory time required of the final judgment rendered in this matter.

Respectfully submitted,

FREDERIC T. HARWARD
1510 Ford Bldg.
Detroit, Michigan, and

McINERNEY & SWABY,
Attorneys for Plaintiff-appellant
2911 Biddle Avenue
Wyandotte, Michigan.

Subject Index

Page

Introduction 1

1 The Michigan Supreme Court did not consider or determine, nor did Ashton draw in question the validity of any statute of the State on the ground of repugnance to the Commerce Clause, 28 USC § 1257 2

2 In appellees' Statement Making Against Jurisdiction, we met the real issue by standing on the opinion of the court below 10

3 Ashton's petition for appeal was not filed within 90 days after entry of final judgment by the highest court of the State, as required by 28 US Code, Revised, § 2101 (c) 14

Table of Cases Cited

Adams Manufacturing Co. v. Storen 14

Banking, Dept. of v. Pink, 317 US 264 ..... 15, 16

Harvester Co. v. Department of Treasury, 322 US 340, 348 13

McGoldrick v. Berwind-White Coal Mining Co., 309 US 33 ..... 6, 10, 14

Memphis Gas Co. v. Beeler, 315 US 649, 651 7

Montgomery Ward & Co. v. Fry, 277 Mich. 260 ..... 3, 4, 5

Mower v. Fletcher, 114 US 127 ..... 15, 16

Page

Norton Co. v. Dept. of Revenue of the State of Illinois, 340 US 534 6

Republic Gas Co. v. Oklahoma, 334 US 62..... 15

Wilson v. Cook, 327 US 474..... 8

Statutes and Other Authorities Cited

28 USC, § 1257 ..... 1, 2, 9

28 USC, § 2101(c) 2, 3

28 USC, § 2103 ..... 8, 9

Honigman's Mich. Court Rules Annotated..... 15

Ohio Use Tax Statute..... 12

Supreme Court of the United States

OCTOBER TERM, 1952

No. 335

ASHTON POWER WRECKER EQUIPMENT COMPANY, A Michigan Corporation,
Appellant,

vs.

THE STATE OF MICHIGAN and the DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Appellees' Reply Brief Bearing on Question of Jurisdiction, and in Further Support of Motion to Dismiss or Affirm

Introduction:

This reply is intended to meet the following points urged by appellant in its brief opposing our statement making against jurisdiction:

(1) that the sole question presented to the Michigan Supreme Court was "whether or not the Michigan Sales Tax Act was contrary to the Commerce Clause of the United States Constitution," 28 U.S.C. § 1257;

(2) that appellees' Statement Against Jurisdiction, fails to meet the real issue; and

(3) that Ashton's petition for appeal was filed within 90 days after entry of final judgment by the highest court of the State, as required by 28 U.S.C. § 2101 (c).

1

The Michigan Supreme Court did not consider or determine, nor did Ashton draw in question the validity of any statute of the State on the ground of repugnance to the Commerce Clause, 28 USC § 1257.

The question presented and decided below was whether the transactions involved were in interstate commerce and hence not assessable under express provisions of the Michigan General Sales Tax Act,[1] the constitutional validity of which was not directly drawn in question on the ground of its being repugnant to the Constitution of the United States, 28 U.S.C. § 1257. The attack was upon a tax assessment, "as opposed to an attack upon the statute imposing it,"[2] as clearly appears from the written protest (8) made by Ashton when paying the tax, the stipulation of facts (17) entered into between the parties, the opinion (48) of the trial judge,[3] and the opinion reversing the judgment of the trial court, 332 Mich. 432.

---

[1] Mich. Pub. Acts 1933, No. 167, Mich. Comp. Laws 1948, § 205.51; Mich. Stat. Ann. [Henderson], Revised Vol. 6, § 7.521 et seq.

[2] Kirkham & Robertson, Jurisdiction of the Supreme Court of the United States, § 11, p. 25; Wilson v. Cook, 327 U.S. 474.

[3] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record of the Michigan Supreme Court.

1. The grounds of protest (8.10) urged by Ashton when paying the sales tax, were that the retail sales upon the gross proceeds of which such tax had been assessed and collected, were actually sales in interstate commerce and that a levying of the tax thereon constituted a burden on interstate commerce, "*contrary to the laws of Michigan* [emphasis, ours] and the United States of America, and contrary to the Constitution of the State of Michigan and the United States of America"; that the taxing authority was estopped from assessing the tax; and that the "said sales upon which an assessment is now sought to be levied, were all made to persons living outside of the State of Michigan.

2. The stipulation of facts (17-19) after reciting the nature of Ashton's business, the course of procedure followed by the Michigan Department of Revenue in auditing the former's books and issuing the disputed assessments, and the payment thereof under protest, reads in part as follows:

"The aforesaid assessment that plaintiff objects to is based upon the inclusion of, in its gross proceeds subject to the Michigan Sales Tax, sales alleged by it made in the following manner:" (then follows a full description of the transactions involved).

3. The trial judge, in his opinion (48-51), after read- the briefs, and considering the facts stipulated or shown by the testimony taken, came to the conclusion that the decision in *Montgomery Ward & Company v. Fry*, 277 Mich. 260, was controlling. The only difference he could see between *Montgomery Ward* and Ashton, was that the former involved an import into Michigan across a state line, while the case at bar involved an

export from Michigan across the state line. "Of course," he said (49), "export is as much commerce as import. A state has no right to lay a burden on exports by way of taxation any more than it has to lay a tax upon imports." He then proceeded to trace the course of business pursued by Ashton in conducting the transactions in question and, having done so concluded as follows:

> "A book could be written on the intricacies and artificial distinctions which have crept into cases in connection with the subject of interstate commerce, and the burdens imposed upon interstate commerce by states endeavoring to get revenue by taxing it. I think, however, that this transaction is fully covered by the decision . . . in the case of *Montgomery Ward & Company against Fry*, 277 Mich 260. Judgment may be entered for the plaintiff (Ashton) for the amount claimed."

4. The Supreme Court of Michigan, on appeal, held that Ashton's sales at retail, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan, and that there were sufficient local activities upon which to predicate a Michigan sales tax. The validity of the statute itself was not considered.

Thus it will be seen that the main objection urged by Ashton in protest against the assessment of the sales tax upon its "interstate transactions," was that it was contrary to the laws of Michigan as well as the Constitution of the United States, and nowhere is it intimated that the Sales Tax Act is invalid on its face. Nor does the stipulation of facts indicate that either party deemed it necessary to attack or defend the constitutional validity of the statute itself. Indeed, the assumption indulged seemed to be that the act

in question prohibits, at least by strong implication, assessment of the sales tax upon gross proceeds derived from interstate retail sales.

The trial court must have had this distinction in mind when he based his decision, holding the assessment (not the statute) invalid, upon the authority of *Montgomery Ward & Co. v. Fry, supra,* 277 Mich. 260, for the Supreme Court of Michigan there said, p. 265:

> "The Michigan general sales tax is valid if limited to intrastate commerce, and this is conceded by plaintiff, but if extended to include receipts from interstate commerce without power of excision thereof then it would have to be held void. The framers of the act have expressly negatived any such inclusion, and the board exceeded its powers in acting otherwise."

While the Michigan Sales Tax Act has been amended since decision in *Montgomery Ward, supra,*[4] the term "gross proceeds" as defined in § 1, continues to mean "the amount received . . . in consideration of sales at retail *within this state,*" thus excluding from the computation any amount received in consideration of retail sales wholly interstate, and the question in each instance remains as posed in *Montgomery Ward, viz.,* did the taxing authority exceed its powers as defined and limited by the statute.

When one turns to the opinion reversing the judgment of the trial court, 332 Mich. 432, at p. 435, 436, 437, it becomes crystal clear that the validity of the Michigan statute was not drawn in question, for the "general problem presented" was declared to be: "under what circumstances

---

[4]

Mich. Pub. Acts 1939, No. 313; Mich. Pub. Acts 1949, No. 272, amending, inter alia, § 4 of the Sales Tax Act.

are sales sufficiently in interstate commerce to be excluded from the imposition of the State sales tax." Since the court was not persuaded that the precise question involved in the appeal had been theretofore determined by them, due consideration must be given decisions of *this* Court, and it was thought that the basic philosophy underlying the relationship between State taxation and interstate commerce was stated by Mr. Justice Stone, writing for the Court, in

> *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33.

It should be born in mind, we think, that in the *McGoldrick Case, supra,* this Court did not exercise its mandatory jurisdiction to hear and determine on appeal a cause wherein the validity of a State statute is drawn in question, for review was on discretionary certiorari to the Supreme Court of New York. And there, as here, the question for decision was whether a city (State) tax laid upon sales of goods for consumption, as applied, infringed the Commerce clause of the Federal Constitution.

Moreover, in deciding the question, the Michigan court invoked the rule, as stated in *Norton Company v. Department of Revenue of the State of Illinois*, 340 U.S. 534, that "a taxpayer claiming immunity from a tax has the burden of establishing his exemption."

In short, if imposition of the tax in question upon Ashton's retail sales, invades the province of Congress, or lays a burden on the Commerce among the States, the fault lies not in the statute but in an attempt by the Department of Revenue to exceed the authority there defined.

Nor can we agree that the brief filed by the State in the court below (if it can be considered as part of the record in this cause), presented or discussed the constitutional valid-

ity of the Michigan Sales Tax Act. Counsel's numerous quotations therefrom, are correct, but they merely show that the "question involved" was whether in the circumstances "the Department of Revenue of the State of Michigan (is) prohibited by the Commerce Clause of the United States Constitution from imposing a tax pursuant to the provisions of the Michigan Sales Tax Act," not whether that statute by its terms or even as applied, violated the Commerce Clause. This theory is further sustained by statements quoted from our brief, on p. 9 of Ashton's "Brief in Opposition," especially, the following:

> "Not only do the above cases clearly refute any argument raised by appellee (Ashton), but they also firmly establish the constitutionality of the appellants' *assessment.*" (Emphasis here supplied).

Lest it be felt we are attempting to draw subtle distinctions, it may be noted that this Court has repeatedly recognized that "the Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled," *Memphis Gas Co. v. Beeler,* 315 U.S. 649, 651.

Consequently, in *Memphis-Beeler, supra,* it was held that an attack upon a state tax upon Federal grounds, but without drawing in question the validity of a State statute, will not sustain an appeal under the Judicial Code, § 237 (a), and that the appeal must be dismissed for want of jusisdiction.[5] The Court say in part:

---

[5] Here, as well as in Wilson v. Cook, 327 U.S. 474, presently cited, the Court treated the appeal as a petition for certiorari and granted the writ as required by § 237 (c) of the Judicial Code as amended. 28 U.S.C. § 344 (c), now 28 U.S.C., Revised, § 2103.

"Our decisions have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under § 237 (a) . . . It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal . . . Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction."

This ruling was followed in *Wilson v. Cook*, 327 U.S. 474, where one of the appeals was dismissed for want of jurisdiction, because the Supreme Court of Arkansas had considered only the validity of a challenged "tax," not that of the statute imposing it.

Although the appeal was treated as a petition for certiorari, as required by § 237(c) of the Judicial Code, now 28 U.S.C. § 2103, the Court, speaking through Mr. Chief Justice Stone considered the matter of sufficient importance to say, p. 482:

"In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or "the right to collect the tax" which has been levied, or to show that the tax alone has been considered. . . . For 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made

> the basis' of an appeal. . . . It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, . . . or, as here, upon a 'tax,' . . . or upon the attempt to collect a tax . . . Since plaintiff's attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code."

In the case at bar, the question of the validity of the Michigan Sales Tax Act was neither presented to the state court nor decided by it. The attack was upon the tax levied under the statute, and imposition of the tax was alone considered. In such circumstances, we respectfully submit, this Court is without jurisdiction under 28 U.S.C. § 1257.

Of course, under the express provisions of 28 U.S.C., Revised, § 2103, this Court may treat the papers on which Ashton's appeal was allowed, as a petition for writ of certiorari, through counsel for appellant do not suggest that procedure but persist in invoking the Court's obligatory jurisdiction.

We respectfully submit, however, since the decision of the Michigan Supreme Court is sound, that a petition for certiorari should be denied for lack of a substantial federal question.

2

In appellees' Statement Making Against Jurisdiction, we met the real issue by standing on the opinion of the court below.

The opinion of the Michigan Supreme Court, 332 Mich. 432, written by Mr. Justice Bushnell, rests on the philosophy stated by Mr. Justice Stone in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, when he said, among other things:

> "It is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations.
>
> "Not all State taxation is to be condemned because, in some manner, it has an effect upon commerce between the States, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the "regulation of the commerce which the Constitution leaves to Congress. * * *
>
> "Courts are called upon to reconcile competing constitutional demands, that commerce between the States shall not be unduly impeded by State action, and that the power to lay taxes for the support of State government shall not be unduly curtailed."

Such a philosophy when applied to the Ashton sales at retail in Michigan, rendered them subject to sales taxation

without offending the Commerce Clause, even though, as Ashton stressed, contracts for the sale of wrecker equipment were negotiated through the channels of interstate commerce, and the property involved in such sales was destined to be immediately transported (by the purchaser) in interstate commerce.

After citing several cases in which transactions of a comparable nature have had the attention of this Court,[6] Mr. Justice Bushnell said, 332 Mich. at p. 438:

> "Through these authorities runs the thread of reasoning that (1) the fact that a sale was negotiated through the channels of interstate commerce is immaterial; (2) that it is also immaterial that the goods will be transported to points outside the State almost immediately; and (3) that a State sales tax is lawfully imposed if it is conditioned upon a sufficient local activity."

And, applying those principles to the case at bar, the Court continued:

> "In the matter before us both title and possession of the wrecker equipment passed to the purchasers in Michigan. The installation of the equipment was performed within Michigan; material was furnished

---

[6] Superior Oil Co. v. State of Mississippi, ex rel. Attorney General, 280 U.S. 390; Western Live Stock v. Bureau of Revenue, 303 U.S. 250; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33; Department of Treasury of Indiana v. Wood Preserving Corporation, 313 U.S. 62; Department of Treasury of Indiana v. Ingram-Richardson Manfg. Co. of Indiana, 313 U.S. 252; International Harvester Co. v. Department of Treasury, 322 U.S. 340; cf. United States v. South-Eastern Underwriters Association, 322 U.S. 533.

within Michigan for use on property belonging to parties outside the State of Michigan; and these transactions, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan. These are sufficient local activities upon which to predicate a Michigan sales tax. The interstate aspects of the transactions are only incidental. The fact that other States may impose a use tax upon the same property is immaterial to decision in the instant case."

We respectfully submit that the decision of the Michigan Supreme Court was sound, and that there is lack of substance in the federal question presented on appeal to this Court.

In their Statement as to Jurisdiction, and again in their more recent brief, counsel urge the claim that, because of its interstate feature, the retail sales transaction involved, is subject to two taxes, the sales tax assessment levied by Michigan, and a use tax assessed by Ohio. And they insist that we now meet this issue, which we cheerfully do as follows:

The Michigan sales tax is levied upon Ashton for the privilege of engaging in business in the State, and it is computed upon the amount of gross proceeds derived from retail sales. The Ohio Use Tax Statute,[7] is imposed upon the purchaser of Ashton's equipment after it has crossed state lines and come to rest in Ohio, for the privilege of

---

[7] Page's Ohio General Code Annotated, Vol. 4-A, and 1951 Supp., § 5546-25 et seq., as amended. Under this Act, § 5546-35, the seller is duty-bound to collect the tax, but the tax itself is assessed against one who uses or stores personal property.

using the personal property. The question posed by appellant is, we think, presently controlled by

Harvester Co. v. Department of Treasury, 322 U.S. 340, 348.

That case raised questions "concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 . . . as construed and applied to certain business transactions of appellant companies," 322 U.S. 341, among which Class D sales were sales by an Indiana seller of Indiana goods "to an out-of-state buyer who comes to Indiana, takes delivery there and transports goods to another State," 322 U.S. 345. The tax was sustained.

Much was said by appellants of "double taxation," particularly with reference to the Class D sales. It was argued that appellants would in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax was said to be exacted from those doing a retail business in Illinois even though orders for the sales were accepted outside of Illinois and the property was transferred in another State. The Court said, p. 348:

> "Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subject to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State. But it will be time to cross that bridge when we come to it. For example, in the *Wood Preserving Corp.* case the State to which the purchaser took the ties might also have

sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. Cf. *Adams Mfg. Co. v. Storen, supra.* "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (*McGoldrick v. Berwind-White Co., supra,* p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage."

Moreover, it cannot be said that Ashton would be subjected to "double taxation" if its purchasers should ultimately be compelled to pay the Ohio use tax after the goods had come to rest in that State. It will be time for this Court to "cross that bridge" when they come to it, and when such an Ohio resident and taxpayer raises the question.

3

Ashton's petition for appeal was not filed within 90 days after entry of final judgment by the highest court of the State, as required by 28 US Code, Revised, § 2101 (c).

Counsel for Ashton contend that appeal in this cause is from the judgment entered by the trial court on the 3rd day of April 1952, in compliance with the mandate of the Supreme Court of Michigan, and they argue from local authority, that the highest court of the State possesses no

authority to render judgment on reversing a judgment of a circuit court. But even the authority which they cite, and from which they quote, Honigman's Michigan Court Rules Annotated, p. 692, fails to sustain their theory. It is there said:

> "Where the judgment of the lower court has been reversed or modified, the decision of the Supreme Court is *effectuated* either by judgment, order, or decree entered in the Supreme Court or by action of the lower court upon *instructions* contained in the remittitur or mandate of the Supreme Court."

It should be noted, however, that under repeated decisions of *this* Court, a judgment of the Supreme Court of a State remanding a case to the trial court with orders to enter a specified judgment, is a final judgment for the purposes of a writ of error or appeal.

Mower v. Fletcher, 114 U.S. 127;

Department of Banking v. Pink, 317 U.S. 264;

Cf. *Republic Gas Co. v. Oklahoma*, 334 U.S. 62.

The judgment of the Supreme Court of California in the case of *Mower v. Fletcher, supra*, 114 U.S. 127, was that the judgment of the State District Court "be, and the same is hereby, reversed . . . with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for it his complaint." Holding that the judgment of the California Supreme Court was final for the purpose of a writ of error to this Court, it was said:

> "The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court

> to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below."

Following the authority of *Mower v. Fletcher, supra*, this Court, in *Department of Banking v. Pink, supra*, 317 U.S. 264, held (headnote 3) that the time within which application to review a final judgment of the New York Court of Appeals may be made to this Court runs from the date of the rendition of the judgment in that court, and not from the date when, under the local practice, judgment was entered on remittitur in the lower state court.

> The rule in *Mower v. Fletcher*, the Court said, p. 267, "applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur."

In the case at bar, in the circuit court for the county of Wayne, a judgment (52) was entered: "that the defendant (State of Michigan) is guilty as the plaintiff has complained against it and (the court) assessed the plaintiff's damages at the sum of $4,447.68," such being the amount of money which the plaintiff had paid upon assessment of the Michigan retail sales tax, under protest.

The Supreme Court of the State, upon appeal, in their opinion, 332 Mich. 432, 433, reversed the judgment of the trial court, and said p. 438,

> "The judgment of the circuit court is vacated and the cause is remanded for the entry of a judgment in favor of the defendant, State of Michigan, department of revenue."

The opinion aforesaid was handed down on the 6th day of March, 1952, and on the same day, pursuant to uniform court practice, a formal judgment was entered upon the journal of the Court in the language which follows:

> "The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is MANIFEST ERROR, Therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same "is hereby reversed and vacated and that the cause be remanded to the Court below with directions to enter judgment in favor of defendants State of Michigan, Department of Revenue. It is further ordered that no costs be awarded herein."

Pursuant to such "directions" from the Supreme Court, the circuit court, on the 7th day of April, 1952, entered a judgment in favor of the defendant, State of Michigan, and against the plaintiff, Ashton, of no cause of action.

It is perfectly plain to us that the opinion and judgment of the Michigan Supreme Court, entered on the 6th day of March, 1952, decided all questions on the merits, ended

the litigation so far as the courts of Michigan were concerned, except for the ministerial act of entering a formal judgment in the court of trial. From such a judgment, certainly no appeal could be had to the Michigan Supreme Court.

When on the 3rd day of July, 1952, Ashton sought from this Court an order allowing an appeal, the application came nearly a month too late to confer jurisdiction.

Wherefore, the appellees respectfully submit that their motion to dismiss should be granted.

Respectfully Submitted,

Frank G. Millard,
Attorney General of the State of Michigan

Edmund E. Shepherd,
Solicitor General of the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General,

Counsel for Appellees,
The Capitol,
Lansing 2, Michigan.